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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 08-13555-jmp

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- - - - -x

U.S. Bankruptcy Court
One Bowling Green
New York, New York

May 9, 2011
2:05 PM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

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Hearing Re: Motions Seeking Modification of the Sale Order
Pursuant to Rule 60(b), the Trustee's Motion for Relief Under
the SIPA Sale Order, Barclays' Cross-Motion to Enforce the Sale
Orders and Adjudication of Related Adversary Proceedings

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Before we start the presentation, I'd be interested in knowing whether or not, notwithstanding the fact that I received reply papers as recently as May 4, any progress may have been made since then in narrowing areas of disagreement.

MR. MAGUIRE: Yes, Your Honor. Bill Maguire for the SIPA trustee. We have been able to resolve a couple of issues, Your Honor. One is with respect to what the right number is on the clearance box and the dispute about specific performance versus a damages remedy. There, you may recall, that with respect to the box, Barclays was taking the position it was entitle to specific performance remedy for the undelivered clearance box assets and that that included or would give Barclays the appreciation value of the securities. We disputed that, and we took the position that Barclays was entitled only to the 869 million dollars in damages that it proved at trial. But we also acknowledged that Barclays was entitled to interest at the New York statutory rate of nine percent per annum. And frankly, when one does the math, one gets to a number through very different paths which, frankly, is pretty much the same number. So what the parties have done is we have agreed that the amount of the undelivered clearance box assets can be set in an order that will specify the payment by the trustee to Barclays of 1.1 billion dollars and that there will be no other

1 payment of any kind. That sets the amount. It obviously
2 reserves the trustee's right to appeal and the ultimate
3 disposition of the box assets, but it sets the amount and makes
4 clear that there's no additional amount by way of distributions
5 or dividends or pre-judgment interest on top of that number.
6 It is a fixed number that both parties have agreed on as being
7 the right number to adjust the ultimate disposition of the
8 undelivered clearance box assets.

9 THE COURT: So this means that specific performance is
10 now a moot issue?

11 MR. MAGUIRE: That is correct.

12 THE COURT: Let me ask you a question about the nine
13 percent pre-judgment interest. There was a dispute as to
14 whether or not the trustee could assert nine percent pre-
15 judgment interest with respect to the trustee's claims. Has
16 that issue been resolved in the context of resolving the issue
17 concerning the clearance box assets?

18 MR. MAGUIRE: It has not, Your Honor. That is still a
19 matter of dispute between the parties.

20 THE COURT: Seems that symmetry would dictate that
21 nine percent should apply both ways or that there shouldn't be
22 nine percent, but rather the federal judgment rate interest
23 applicable to both.

24 MR. MAGUIRE: The parties have not reached agreement
25 on symmetry or anything else other than simply the number with

1 respect to the clearance box.

2 THE COURT: I'm not going to get in the way of that
3 agreement, but I see Mr. Boies standing, I presume in reference
4 to my comment on the pre-judgment rate.

5 MR. BOIES: Exactly, Your Honor, and although I was
6 not a direct participant in these negotiations --

7 THE COURT: Thanks for fixing that.

8 MR. BOIES: Yeah, see how long it lasts.

9 My understanding was to avoid exactly the question
10 that you're -- the Court raised, that we agreed that the 1.1
11 million (sic) dollars was in satisfaction of our specific
12 performance claim. Now, if that is not your understanding,
13 then maybe we ought to have a sidebar. But my understanding
14 from the negotiation was that in order to avoid any issue of
15 symmetry or lack of symmetry or any inference of precedent,
16 that we agree that the 1.1 million (sic) dollars --

17 THE COURT: Billion.

18 MR. BOIES: -- 1.1 billion dollars, yes, thank you --

19 THE COURT: I didn't want you to be in trouble with
20 your client, Mr. Boies.

21 MR. BOIES: I appreciate that because it would have
22 been a lot of trouble. The 1.1 billion dollar amount was in
23 satisfaction of our specific performance claim, which is what
24 we claimed, and that didn't force either of us to reach the
25 issue of damages or interest.

1 Now, if that is not counsel's understanding, perhaps
2 we ought to have a sidebar.

3 THE COURT: Well, I think that all that I heard from
4 counsel for the trustee was how the number was derived. I'm
5 not sure that I heard anything that indicated that any rights
6 were being conceded on either side.

7 However, you did well in this agreement compared to
8 how you would have done with me, so you should feel some level
9 of comfort that you've reached a good number. I would be even
10 happier if there were some symmetry in the agreement because
11 obviously, the number was derived by using some mathematical
12 calculations that included a presumed interest rate.

13 MR. BOIES: No, Your Honor, that's not so. That's the
14 point I wanted to make. It did not include some kind of
15 mathematical calculation that involved interest rate. It was a
16 settlement of our specific performance claim. We believe the
17 appreciation is significantly above 1.1 billion dollars. We
18 thought we were entitled to specific performance. And we were
19 settling our specific performance claim for 1.1 billion
20 dollars. It had no implication of any interest rate at all
21 from our standpoint, and indeed, I think that that was
22 something that the parties actively talked about in the
23 negotiations.

24 So --

25 THE COURT: Well, maybe this is one reason why judges

1 rarely want to know what happens in negotiations, because the
2 more you know, the more likely it is that the deal will
3 unravel.

4 I accept the settlement at 1.1 billion dollars that ha
5 been described, and I'm disregarding the circumstances that
6 give rise to it, including the assertion that you've made that
7 this is a settlement of your specific performance claim. Of
8 course it is; it resolves issues concerning the clearance box
9 assets regardless of the claims being made or the defenses
10 being made on either side. It's just an agreed number.

11 MR. BOIES: It is an agreed number, Your Honor, but it
12 is an agreed number with respect to a very specific claim.

13 THE COURT: Yes. It's an agreed number with respect
14 to the clearance box aspect of the decision.

15 MR. BOIES: Even more specific. We didn't -- we
16 only -- our claim with respect to that was a claim for specific
17 performance. We did not make a claim for damages; we made a
18 claim only for specific performance.

19 THE COURT: Well, whether or not that was a claim for
20 specific performance or for the value of the securities as they
21 may have accreted through the application of an interest rate
22 or through other market factors is really irrelevant because
23 you've made a deal which makes it unnecessary for me to address
24 those specifics at an agreed number. If we were to get into
25 the specifics, which I think we're trying to avoid, you might

1 well have lost on the issue of specific performance. So
2 there's really no point in emphasizing that that's what you
3 just settled. You settled a claim for clearance box assets.
4 It's true that in the history of the case, you were regularly
5 seeking delivery of those assets, but whether or not you had
6 entitlement to delivery of those assets as valued as of the
7 closing or as valued as of the time that you ultimately
8 received delivery is a matter that was never litigated during
9 the trial. This is a matter that came up post-trial. I am
10 happy that you resolved it.

11 MR. MAGUIRE: Your Honor, Bill Maguire again for the
12 SIPA trustee. There's one other agreement that we've managed
13 to reach, and that's with respect to two of what I'll call are
14 the smaller items of margin, one involving -- you'll see it in
15 the briefs. It's a reference to 267 million of margin assets
16 which turn out to be partly LBIE customer funds and another
17 number that was simply some confusion between the parties. So
18 those fairly minor aspects of the margin dispute have been
19 resolved.

20 THE COURT: Is this the 137 million dollar issue?

21 MR. MAGUIRE: Exactly.

22 THE COURT: Okay.

23 MR. MAGUIRE: So those two small numbers have been
24 resolved, and we have, I think, an agreement, almost complete
25 agreement on what the right number is that Barclays should pay

1 the trustee, assuming that the arguments that are raised today
2 were to be unsuccessful, the arguments by Barclays. The total
3 amount, in other words, of margin that Barclays received, we
4 understand now, is a total -- we calculate it as 2.101 billion
5 dollars. Barclays came up with a number that was eight million
6 dollars less than that, and we've been informed by Barclays
7 that the reason for the difference is eighty million dollars
8 that was not, in fact, received by Barclays but is in a
9 suspense account at the OCC. We had been going by Barclays'
10 witness, Gary Romain; his notes indicated that Barclays had
11 received 1.375 billion dollars in cash at the OCC. But we
12 understand that it's been clarified that eighty million of that
13 is, in fact, in a suspense account. So we're checking that
14 today, but assuming we confirm that, I think we understand that
15 the total amount of Lehman margin that Barclays has received in
16 connection with this transaction.

17 THE COURT: And is there a breakdown as to cash and
18 cash equivalence versus government securities within that total
19 number?

20 MR. MAGUIRE: We understand -- it's actually not
21 within that number because most of the government securities
22 are actually in the possession of the trustee; they were never
23 transferred to Barclays. But we do understand, I think both
24 parties have used the same number to cover that universe of
25 government securities, of margin in the form of government

1 securities of being approximately one and a half billion
2 dollars.

3 THE COURT: And of the one and a half billion dollars,
4 are we talking about government securities regardless of
5 maturity?

6 MR. MAGUIRE: My understanding is that one and a half
7 billion is entirely -- certainly almost entirely made up of
8 government securities with maturities of greater than ninety
9 days.

10 THE COURT: Okay.

11 MR. MAGUIRE: There are some T-bills or whatever that
12 are a little bit less that I think are additional to that. So
13 that's my understanding, is that the dispute over government
14 securities is in the ballpark of one and a half billion
15 dollars.

16 THE COURT: Okay. If I gave you more time, could you
17 reach more agreements?

18 MR. MAGUIRE: My own sense is we've reached the end of
19 the road --

20 THE COURT: All right.

21 MR. MAGUIRE: -- on agreements, Your Honor.

22 THE COURT: In thinking about how best to deal with
23 this, it seems to me that rather than having one side argue
24 every issue in dispute then having the other side argue every
25 issue in dispute, that we should consider doing this on a

1 dispute-by-dispute basis, thereby focusing in on issues such as
2 margin and having what amounts to a complete argument in
3 connection with that. Does that make sense to the parties?

4 MR. BOIES: It does from our respect.

5 THE COURT: Now, why don't we start with margin, then?
6 It's a big-ticket item and we were just talking about it. And
7 I'm familiar with the issue.

8 MR. MAGUIRE: If I might approach, Your Honor?

9 THE COURT: Yes, you may.

10 MR. MAGUIRE: Again, Bill Maguire for the SIPA
11 trustee.

12 THE COURT: It's obvious that my suggestion had been
13 anticipated by the parties because this binder is specifically
14 addressed to the margin assets.

15 MR. MAGUIRE: It takes us time to learn, but we do
16 eventually start to catch on, Your Honor.

17 Your Honor, we had -- this obviously is, by far, the
18 most significant of the disputed assets. The total amount in
19 dispute is some four billion dollars, and we under -- I mean,
20 that was, frankly, the most significant disputed asset that was
21 tried in the course of the thirty-four day trial. We
22 understood that the Court's opinion in February squarely
23 addressed and resolved that dispute. And we understood from
24 the Court's opinion that the trustee had won on this issue of
25 Lehman's cash and Lehman's cash equivalents and similar cash

1 assets.

2 Having won, then, we find ourselves now, at this
3 stage, in connection with the entry of the form of order facing
4 this fairly fundamental issue that Barclays is raising in which
5 Barclays is now saying that it's entitled to an offset, which
6 in its papers, it puts in the amount of six billion dollars and
7 then says that Barclays will take only about one billion or a
8 little bit more than one billion dollars by way of offset,
9 still an absolutely staggering number.

10 There are a lot of problems that we have with this
11 argument. We've characterized it as a new argument, and I want
12 to just be clear what we mean by that. We don't mean that this
13 is just an argument that's arriving too late, that for some
14 procedural misstep, this is something that should really and
15 could have been tried in the course of the case. And when we
16 say it's new, we are objecting to it because this argument is
17 the exact opposite of what Barclays was arguing throughout the
18 trial. Barclays could not have raised this argument during the
19 trial because during the trial, Barclays was making affirmative
20 representations to the Court that totally contradict this
21 argument.

22 And what we've done in the binder that's before you,
23 Your Honor, in the tab 1, is to put side by side on one sheet
24 of paper the position that Barclays is asserting now with the
25 position that Barclays has asserted up to now. And Barclays'

1 position, in brief, is that under the so-called transfer and
2 assumption agreement, Barclays took on and assumed this
3 enormous liability, some six billion dollars for the shorts,
4 and that was new consideration. And Barclays is arguing that
5 somehow, implicit in the Court's opinion, is the voiding of
6 that agreement. And they say that since they gave some six
7 billion dollars of consideration in undertaking that agreement,
8 Barclays is entitled to be compensated for that consideration.
9 And that whole argument is premised on the notion that in
10 entering into the transfer and assumption agreement, Barclays
11 was providing new consideration, and the new consideration was
12 assuming the shorts, the short exchange-traded derivatives.
13 Those liabilities were in the amount of six billion dollars;
14 Barclays says it took those liabilities on under that agreement
15 and that Barclays was not otherwise obliged to take on any of
16 those liabilities.

17 That is precisely the opposite of what Barclays said
18 up to now. On the left side of the page, we put forward from
19 Barclays' reply brief filed just a couple of weeks ago where --
20 last week, actually, where Barclays says in paragraph 79, "Thus
21 the purchase agreement did not require Barclays to assume the
22 short options." Well, that is simply not true, and Barclays
23 itself affirmatively represented to the Court that the purchase
24 agreement did require Barclays to assume the short positions.
25 And on the right side of the page before you, we put forward

1 Barclays' positions both before trial and, indeed, after trial,
2 all of which uniformly represented to the Court that under the
3 purchase agreement, under the clarification letter, Barclays
4 assumed responsibility for the short positions, the short
5 exchange-traded derivatives. The first is before trial, and
6 that's Barclays' January 2010 opposition brief at paragraph 380
7 where Barclays says, and I quote, "These purchased assets were
8 specifically defined to include LBI's exchange-traded
9 derivatives." And the sentence goes on and is accompanied by a
10 citation to the clarification letter.

11 And Barclays goes on to say, "Thus, Barclays acquired
12 not only the ETD, the exchange-traded derivative positions
13 themselves," and it includes, then, a phrase that specifically
14 defines what those exchange-traded derivative positions were,
15 composed of both assets, the long positions, and liabilities,
16 the short positions.

17 That is completely consistent with Barclays' position
18 after trial. After trial, and we put forward here an excerpt
19 from Barclays' November 2010 post-trial brief at paragraph 88,
20 and there, it's a lengthy quotation, but it starts describing
21 the clarification letter and how it actually narrows and
22 provides more precision to the definition of purchased assets.
23 And it goes on to say that no other short positions are being
24 assumed with respect to the trading inventory Barclays is
25 acquiring "except for the ETDs, where Barclays is acquiring

1 both long and short positions". And then we have a
2 parenthetical that further confirms that this is both assets
3 and liabilities.

4 So the new argument that Barclays did not acquire, was
5 not already obliged under the purchase agreement to take
6 responsibility for the shorts is a 180 degree reversal of the
7 representations that Barclays made before trial and after
8 trial. That, of course, is entirely consistent with the
9 testimony that the Court heard here. You may remember witness
10 after witness was shown the financial schedule in which there
11 were -- this is under the asset purchase agreement in which
12 there were assets on one side and liabilities on the other, and
13 as those assets changed during the week, ultimately, many of
14 the shorts went away. But the shorts that remained included
15 the exchange-traded derivative shorts, and that's where
16 Barclays confirmed before trial and after trial that it
17 retained -- it assumed liability for those shorts, the
18 exchange-traded derivative shorts.

19 So now, what we have is Barclays asking for an offset
20 for assuming short liabilities to the OCC which Barclays was
21 already required to assume under the purchase agreement.
22 Barclays is saying it should get a credit for giving
23 consideration in taking those shorts on when it entered into
24 the transfer and assumption agreement. The problem with that
25 is that Barclays was already obligated to assume those shorts,

1 whether it entered into the transfer and assumption agreement
2 or not.

3 Barclays has a similar argument under Section 550 of
4 the Code. That's exact replay of the same argument, except
5 this time defining this consideration as a cost. Now again, I
6 think it's a fairly clear principle of law. When someone is
7 already obliged to do something, when you're already legally
8 required to assume those liabilities, you can't claim that
9 there's some additional cost in assuming those liabilities.
10 You can't claim that there's some additional consideration that
11 you're providing in undertaking to do what you're already
12 required to do. And Barclays, by its own admissions, was
13 already required to assume these short positions.

14 I think there are many other subsidiary points that
15 one could make with respect to this new argument, but I think
16 that really is the heart of the issue, Your Honor.

17 THE COURT: And so your fundamental argument is that
18 having agreed to the number with Barclays, which is
19 approximately 2.1 billion dollars, that that is the amount that
20 the trustee should be receiving back --

21 MR. MAGUIRE: Exactly.

22 THE COURT: -- without offset.

23 MR. MAGUIRE: Without any offset.

24 THE COURT: Right. That's the position.

25 MR. MAGUIRE: And exclusive of any prejudgment

1 interest.

2 THE COURT: And exclusive of any prejudgment interest
3 which you would assert should run at the same nine percent
4 rate -- and I don't mean to restart the dispute -- but at the
5 same nine percent rate which, at least for your internal
6 purposes, you used to derive the 1.1 billion dollar number that
7 we talked about earlier in reference to the clearance box asset
8 agreement.

9 MR. MAGUIRE: Exactly, Your Honor.

10 THE COURT: Okay. I understand.

11 Mr. Boies?

12 MR. BOIES: Yes, and may I approach with a book of our
13 own, Your Honor?

14 THE COURT: Yes, of course.

15 Thank you.

16 MR. BOIES: Just in terms of our presentation, I was
17 going to start by addressing the government securities issue
18 that the Court raised, and then get to the argument that he
19 just made, but I'm happy to go in reverse order, if that would
20 be easier for the Court.

21 THE COURT: Well, since Mr. Maguire has not yet made
22 his argument with respect to the government securities, I don't
23 really care who goes first on the argument.

24 Do you care, Mr. Maguire?

25 MR. MAGUIRE: I don't, Your Honor.

1 THE COURT: Fine. So you'll get cleanup on that
2 issue.

3 MR. BOIES: Okay. So let me begin with the government
4 securities issue, and in that connection, I would like to begin
5 with tab 6. And the reason I do is because what we are trying
6 to do today is not argue to the Court what we think is right.
7 We're trying to argue to the Court what we think is a natural
8 extension or application of the Court's order. And as we read
9 the Court's order on margin, it was -- the Court said over and
10 over again that there was no Lehman cash going to Barclays.
11 And if that is correct, then the issue becomes what is cash and
12 cash equivalents? And we recognize that cash equivalents
13 should be treated as cash under the Court's opinion.

14 What we are arguing about is what constitutes cash
15 equivalents. Our view is that cash equivalents are government
16 securities of ninety days in duration or less, not government
17 securities of unlimited duration. The order that the trustee
18 has given the Court would provide that government securities of
19 fifteen, eighteen, nineteen years maturities would be
20 considered cash or cash equivalents. We think there is simply
21 no support in the record and no support outside the record, as
22 far as that's concerned, for an interpretation of cash and cash
23 equivalents of that nature.

24 If you would turn to tab 10, you'll see a reference to
25 the fact that it is first undisputed that in their annual

1 reports at the time of the sale, both Barclays and Lehman
2 defined cash equivalents as securities with a maturity of three
3 months or less. By contrast, as is indicated here, many of the
4 margin assets at issue consisted of government securities with
5 maturities greater than three months. Indeed, many of the
6 securities consisted of government securities with maturities
7 of over fifteen years. Maturities longer than fifteen years,
8 for example, BCI Exhibit 686, is a Treasury bond of about 120
9 million dollars with a sixteen-year maturity. BCI Exhibit 689
10 is a Treasury bond of over eighty-six million dollars with a
11 sixteen-year maturity. BCI Exhibit 691 is a Treasury bond of
12 175 million dollars with a sixteen-year maturity. BCI 687 is a
13 security bond of approximately sixty million dollars with a
14 nineteen-year maturity. All of these government securities and
15 all the ones like them would, under the government's proposed
16 order, be treated as cash and cash equivalents. And we don't
17 think that that is consistent with Your Honor's opinion, and we
18 don't think that such a position could be possibly justified
19 based on the trial record. So what we would argue first --

20 THE COURT: Well, wait a minute. Wait a minute, Mr.
21 Boies.

22 MR. BOIES: Yes.

23 THE COURT: And I realize that you're focused on the
24 definition of cash equivalents as that term is tied into the
25 duration of a government security. But I think you're

1 misreading the opinion as a whole as it relates to the
2 disposition of the disputed margin because while it is true --
3 and you emphasize these points -- that the opinion references
4 Lehman cash as an important factor in the decision, it's also
5 true that this entire issue relating to government securities
6 did not come up during the trial, at least I can't remember
7 that it came up during the trial in reference to Barclays'
8 defense to the request by the trustee for a turnover of
9 disputed margin.

10 Additionally, the opinion itself isn't limited to cash
11 but rather finds, based upon an interpretation of the record
12 relating to the negotiation, drafting, and execution of the
13 clarification letter itself, that there was no meeting of the
14 minds in reference to including margin within the clarification
15 letter.

16 So it would be fully consistent with the opinion I
17 wrote for an order to be entered that delivers all 2.1 billion
18 dollars from Barclays to the trustee quite apart from any
19 arguments relating to what cash and cash equivalents may mean
20 as tied to the duration of government securities.

21 MR. BOIES: The only thing I would say, Your Honor, is
22 that obviously, it's your opinion and your order and you will
23 write it as you see fit. But I would suggest that if you go
24 beyond the "no cash" rationale, there simply is no support in
25 the record for -- even if you ignore the meeting of the minds,

1 even if you ignore the clear language of the agreement, which,
2 as the Court knows was filed with the Court, incorporated in
3 the Court's -- referenced in the Court's sale order, even if
4 you ignore all that, there is still nothing in the record that
5 would justify giving them all of this margin. I mean, you get
6 there -- they get there -- not the Court, but the trustee gets
7 there, for example, by simply excising words from the sections
8 of the agreement that they quote, like Section 1(b). They
9 leave out the language that says, "except to the extent
10 otherwise specified herein or in the agreement." If you
11 look --

12 THE COURT: Well, we're not going to relitigate --

13 MR. BOIES: No.

14 THE COURT: -- what we spent so much time litigating
15 last year.

16 MR. BOIES: Not at all.

17 THE COURT: And I remember vividly Mr. Rosen's
18 testimony on examination and cross-examination and the
19 circumstances that surrounded his parenthetical. I am mindful
20 of at least my recollection of the record. And I'm also
21 mindful of what I wrote. And what surprised me -- and I'll say
22 this, actually, to both sides -- what surprised me when I saw
23 the briefs that were submitted on April 28 and again on May 4
24 as a follow-up to our informal chambers conference in which we
25 talked about the dispute surrounding the orders to be entered

1 in reference to the February 22 opinion, I really did not have
2 sufficient foreshadowing of the kinds of disputes that were
3 going to be raised in connection with the form of order to be
4 entered. And it appears to me -- and I don't mean to be
5 suggesting that this amounts to a motion for reconsideration by
6 either party -- but it appears to me that much of what is being
7 argued in the context of the form of order is a motion for
8 reconsideration, and that the issues surrounding margin do not
9 really tie to the duration of government securities. It seems
10 to be a completely new argument by Barclays, one that was not
11 supported at all during the lengthy trial that we had. At no
12 time can I recall any argument made during trial that suggested
13 that the margin issue was in any way tied to the duration of
14 government securities. This is the first that I'm hearing it.

15 MR. BOIES: Your Honor, the record at trial is, of
16 course, the record at trial, and I don't mean to argue with the
17 Court about the Court's recollection of it. But my
18 recollection of it, right or wrong, is that the fight over
19 these assets was, as I think someone could read the Court's
20 opinion as saying, was a fight over cash, Lehman's cash.

21 THE COURT: No, that was only one part of it Mr.
22 Boies. That was the part that made it very crystal clear to
23 me, because the trustee was always talking, as I heard it,
24 about cash and cash equivalents, and that was something that I
25 heard repeatedly.

1 MR. BOIES: Yes.

2 THE COURT: But Barclays was never talking about
3 noncash margin; it never came up.

4 MR. BOIES: But Your Honor, that's because we were
5 saying that we got them both. We were saying that we got them
6 both.

7 THE COURT: Yes, but you're not entitled to government
8 securities, Mr. Boies. They're excluded. You may have gotten
9 the business that included the trading of government
10 securities, but you didn't get the securities themselves.

11 MR. BOIES: But Your Honor -- that's from Section
12 1(b), right? That's what you're talking about? Section 1(b)?

13 THE COURT: I'm talking about the clarification
14 letter --

15 MR. BOIES: Yes.

16 THE COURT: -- and the purchase agreement.

17 MR. BOIES: Right.

18 THE COURT: But I don't want to argue with you about
19 this.

20 MR. BOIES: But all --

21 THE COURT: Your issue is whether or not the form of
22 order proposed by the trustee is or is not consistent with my
23 opinion.

24 MR. BOIES: Right.

25 THE COURT: And I'm letting you know, I believe it is.

1 MR. BOIES: Okay, and if you don't want me to talk
2 anymore about it, I'll stop talking about it.

3 THE COURT: No, I'm anxious to hear everything you
4 have to say.

5 MR. BOIES: Okay, one of the things I want to say is I
6 don't think it is consistent with Your Honor's opinion, all
7 right, because I do not think that Your Honor lays out in your
8 opinion a basis for giving them the margin other than cash and
9 cash equivalents. As the Court says, that's what they argued
10 at trial. All right? And that was the -- and that's what was
11 in the Court's opinion. And I don't think the Court's opinion
12 lays out a basis for giving them the margin other than cash and
13 cash equivalents. And we've asked them to point to the
14 sections; they point, for example -- the reason I mention 1(b)
15 is they point to Section 1(b) and Section 1(b) does talk about
16 the business and whether they include government securities and
17 the extent to which they do, and then goes on to say, though,
18 it says, "except to the extent otherwise specified herein or in
19 the agreement." And Your Honor referenced that exact section
20 in the Court's opinion. And as you -- and I would have
21 interpreted the Court's opinion as being something that gave
22 them the argument they were making at trial, which is cash and
23 cash equivalents were excluded.

24 If the Court intends to make a decision beyond that,
25 that's the Court's decision. And I'm really not -- I'm really

1 not trying to argue the underlying merits.

2 THE COURT: Well, even your papers, Mr. Boies,
3 acknowledge that the decision can be read to go beyond cash and
4 cash equivalents. You at least gave me that in your papers.

5 MR. BOIES: Absolutely, Your Honor.

6 THE COURT: But you're not giving it to me now.

7 MR. BOIES: Well, Your Honor, what I'm -- I believe
8 that there are references in the Court's opinion. I don't
9 think it's the Court's reasoning, but if the Court says it is
10 the reasoning, obviously, I yield.

11 THE COURT: Multiple grounds for finding against you
12 on this point.

13 MR. BOIES: Okay, but the only thing I would say to
14 the Court, okay, is that I would just ask the Court -- I won't
15 argue it anymore -- I would just ask the Court to look at those
16 multiple bases because when you had a -- and maybe we can --
17 maybe we can't agree, but maybe we could agree that the primary
18 thing that the Court talks about is the cash and cash
19 equivalents. And sometimes when you have multiple bases, the
20 Court has not looked with the same exacting scrutiny at the
21 support or lack of support for some of the alternative bases,
22 and the only thing that I would ask the Court to do is that if
23 you are going to hold that they are entitled to all of the
24 government securities that were margin, that the Court look
25 at -- take a hard look and see whether there is a basis for

1 that alternative finding. And with that, I'll move on, unless
2 the Court has a question.

3 THE COURT: That's fine. But is there no -- let me
4 just be clear on this. There's no dispute with respect to the
5 calculation of the margin. Is that correct?

6 MR. BOIES: There is, I think, only the -- I think
7 they will ultimately agree with us on the eighty million
8 dollars, and as I understand it, the difference between 2.021
9 billion and 2.101 billion, the difference being 80 million
10 dollars. And if the Court rejected the argument I just made
11 and all the other arguments that I have on this issue, then the
12 only dispute on this aspect would be that eighty million
13 dollars.

14 THE COURT: Okay, and then as to the 1.5 billion which
15 is in government securities, of that 1.5 billion, what
16 percentage constitute long-term government securities of the
17 sort that you identified in your argument, and what percent
18 represent relatively short-term obligations that might fit the
19 definition of cash equivalents?

20 MR. BOIES: Can I have just one moment, Your Honor?

21 THE COURT: Sure.

22 MR. BOIES: Your Honor, our common understanding is
23 that the government securities longer than ninety days are
24 approximately 1.5 billion (ph.) dollars.

25 THE COURT: That's a fairly wide swath of securities,

1 though. There could be securities that are six-month
2 securities or securities that are, as you point out, sixteen or
3 nineteen year securities. It depends on the maturities. I
4 don't suggest that you selected the long-term maturities to be
5 in any way misleading, but I don't know to what extent they're
6 representative.

7 MR. BOIES: Your Honor, could I have just one more
8 moment?

9 THE COURT: Absolutely.

10 MR. BOIES: Your Honor, our best estimate is that 640
11 million have maturities of more than fifteen years. Now, I
12 understand that it is still a large amount of real estate
13 between fifteen years and ninety days, but as I -- and we can
14 furnish a the breakdown of that, and we'd be prepared to
15 furnish a breakdown of that to the Court. But as I stand here
16 now, I can tell you what is longer than ninety days, and I can
17 tell you what's longer than fifteen years. But exactly where
18 the amount is between the ninety days and the fifteen years, we
19 would need to do some calculations. But we can do that and we
20 can furnish it to the Court.

21 THE COURT: Okay, and I'm not being at all critical
22 here when I make this next point, but why is it that these
23 essentially defensive issues concerning the duration of the
24 government securities that constituted part of the margin never
25 came up during the trial? I never heard this before.

1 MR. BOIES: Your Honor, during the trial, we read them
2 as saying, as the Court indicated a few moments ago you read
3 them as saying that they were objecting to cash and cash
4 equivalents. Now, cash and cash equivalents has a very
5 standard definition. It's not only the definition that's in
6 our annual report, Barclays' annual reports, their annual
7 reports. It is the Financial Accounting Standards Board, the
8 International Accounting Standards Board defined cash
9 equivalents as investments of original maturities of three
10 months or less. And we set this out with some of the citations
11 in chart 12 of what we've given the Court. So when they talked
12 about cash and cash equivalents, from our perspective, that had
13 a very defined meaning, including in the materials that were in
14 the record.

15 THE COURT: So did you believe during the trial that
16 the only margin that was in dispute was margin that fit the
17 definition of cash and cash equivalents as that term might be
18 understood from standard reference points?

19 MR. BOIES: We believed that their basic argument was
20 cash and cash equivalents, Your Honor. There was no doubt,
21 okay, that there were discussions of proprietary margin, but I
22 think if the Court goes back and looks at the record, the Court
23 will find references to any issue that the trustee was arguing
24 about other than cash in terms of these margins few and far
25 between. I'm not saying they aren't there, but I'm saying that

1 the primary argument was, as I think everybody's recognized,
2 that there was to be no transfer of cash and cash equivalents,
3 and there were clearly transfers of cash and cash equivalents.

4 THE COURT: I recognize that, but from my perspective,
5 and I've been -- I've been presiding in this 60(b) dispute for
6 some time -- I cannot recall a single instance in which
7 Barclays raised during the trial in defense of the claims made
8 by the trustee to recover margin, that that margin should not
9 be turned over on account of the fact that a significant
10 percentage of the amount in dispute was invested in long-term
11 government securities. It just never was presented to me.

12 MR. BOIES: I think what was presented was the
13 question of cash or cash equivalents. We argued in our post-
14 trial brief that cash equivalents were limited to securities of
15 more than -- or, less than ninety days, less than three months.
16 In our trial presentation, we argued that we were entitled to
17 all of the margin. We thought we were fighting over whether we
18 were entitled to all of the margin, our position, or whether we
19 were only entitled to that margin that was not cash and cash
20 equivalents. And we thought that the term cash and cash
21 equivalents had a standard definition that we reference in our
22 post-trial brief. So I think we tried to be clear on that
23 issue.

24 THE COURT: I understand. I'm just telling you that I
25 never heard until this briefing round in connection with the

1 form of order to enter that we had an issue concerning longer
2 term maturities of government securities and that the amount at
3 issue was as much as 1.5 billion dollars. And trust me; if you
4 had brought that up during the trial, I would have remembered
5 it. It didn't come up.

6 MR. BOIES: I think the Court is correct that there
7 was nothing in the trial that calculated what percentage of
8 the -- or, what amount in dollars of the government securities
9 were longer than ninety days, although that number was
10 obviously in the materials that went into evidence. I don't
11 think we argued that -- I don't think we argued that issue
12 until the post-trial briefs.

13 THE COURT: Okay, so we're in agreement on that at
14 least. And Mr. Maguire, I think, should have an opportunity to
15 address the government securities component of margin which
16 we've been addressing. You had another issue you wanted to
17 address as well, Mr. Boies.

18 MR. BOIES: I did, and I can do that -- I'll do this
19 in any order that is most helpful to the Court. Would the
20 Court like me to jump to responding to his point, which was --
21 which didn't have to do with the definition of cash and cash
22 equivalents; it had to do with what we referred to as the
23 offset point.

24 THE COURT: Sure. Let's do the offset point, and then
25 we'll give Mr. Maguire a chance --

1 MR. BOIES: Okay.

2 THE COURT: -- to talk about government securities,
3 and he'll be able to also counter your offset point.

4 MR. BOIES: Okay. Now, as I understand the trustee's
5 argument in response to -- you can call it offset, Section
6 550(e), it's all basically the same point, which is that we
7 took certain liability and we took the margin that secured
8 those liabilities, and if you turn to tab 18, you'll see that
9 this issue only arises in the present context, the context
10 we're talking about right now, in connection with the 1.3
11 billion in margin assets transferred to Barclays as part of
12 LBI's OCC accounts. And these were security for the
13 liabilities, the proprietary and affiliate positions
14 liabilities in those accounts.

15 Now, the -- going on to the next chart, the amount of
16 any liabilities, of any of these liabilities that Barclays was
17 taking on were secured by the transferred assets which included
18 the margin. And if you say that Barclays is required to take
19 those liabilities without taking the margin that comes with it,
20 what you're obviously doing is you are taking away part of the
21 quo for the quid that was being negotiated. Now, this is an
22 argument that the trustee, in his briefing, doesn't really
23 answer the 550(e) argument, except to say we already had that
24 obligation, that is, you already had the OCC obligation. But
25 the Court will remember, among other things, that at the time

1 the TAA was executed, the reason it was executed when it was is
2 the OCC was about ready to close those accounts out. But the
3 evidence was undisputed that if this wasn't executed when it
4 was, those accounts were going to be closed out. The reason it
5 was executed before the deal was closed was because the OCC
6 said in no uncertain terms that unless it was executed, they
7 were going to close those accounts out and Lehman wasn't going
8 to have anything. It was at that point that Barclays stepped
9 up and said that they would sign the TAA which, by its terms,
10 gave them the margin that secured the liabilities as well as
11 the liabilities.

12 We are not here trying to get margin that was
13 transferred that was in excess of what was needed to secure the
14 assets. And there's a chart in here that has the numbers on
15 it. If you go to chart 32, Your Honor, I think maybe you can
16 see what I'm talking about. At the time of the closing, at the
17 time of the closing, there was a net liability of 1.1 billion
18 dollars that Barclays assumed if you ignore the margin. That
19 is, if you just look at the net of the long and short
20 positions, there's 1.1 billion dollars at the time of closing.
21 In addition to that, as this indicates and BCI Exhibit 147 at
22 page 2 supports this, after the closing, there was an
23 additional 730 million dollars of losses on the option
24 positions in the LBI proprietary accounts -- the LBI
25 proprietary accounts at OCC that Barclays was assuming.

1 Now, we're not saying -- I'm now passing all of our
2 other arguments, all right? In this part of our argument, we
3 are not saying that we get the margin that was in excess of
4 that net liability. That is, to the extent that there was
5 margin -- and there was margin -- that was in excess of that
6 1.8 billion dollars, we're not saying we get that under this
7 offset. But what we are saying is that you can't say that we
8 take the OCC accounts, which we didn't have to take -- they
9 were going to be closed out; we didn't have to sign that TAA.
10 We signed the TAA because we were getting not only the
11 liabilities but the margin that secured those liabilities. And
12 when you try to break up the TAA and you say, well, you're
13 going to take the liabilities that exist at the closing, but
14 we're not going to give you the margin that was already
15 pledged, secured by those liabilities, we don't think there is
16 any basis in law or in fact or in equity to do that.

17 Let me put it this way. If we have not executed a
18 TAA, if we've not taken over the OCC, we would have been
19 neutral as far as the OCC assets and liabilities are concerned;
20 they would have been neutral. All right? The fact that we
21 took them over before they were closed out means that under the
22 Court's order, they are getting at a minimum the difference
23 between the margin that was required to secure net liabilities
24 that existed and the total margin. What they're arguing for is
25 that this TAA assumption should, on day one, have been

1 something that gave them a 1.1 to 1.8 billion dollar windfall
2 plus amount and gave us on day one a 1.1 to 1.8 billion dollar
3 shortfall. And their argument is that we said at the trial
4 that we were entitled to all of the long and short positions
5 and including the margin. When he quoted that to Your Honor,
6 he left out the last clause of our statement which talked about
7 including the margin. That was our position.

8 Our position at trial was that we were entitled to all
9 the assets all the liabilities, all the margin. If the Court
10 concludes that we're not entitled to all of the margin, we
11 think we must at least be entitled to that amount of the margin
12 that is necessary to keep us from having, on day one, a net
13 liability.

14 Now, I want -- just one more point, I would ask you to
15 look at tab 9 because this sets out Mr. Kobak's -- 29, tab 29
16 which sets out Mr. Kobak's testimony. Now, Mr. Kobak was the
17 trustee's 30(b)(6) representative. That is, he spoke for the
18 trustee, the trustee is bound by what he testified to. And
19 we're talking about the OCC margin. And I asked him,
20 referencing this part of the agreement that said LBI has
21 assigned Barclays "all rights and securities, cash and other
22 property defined as collateral pledged by LBI, the Options
23 Clearing Corporation held for OCC's benefit of JPMorgan Chase.
24 Did you see that?"

25 "A. Yes.

1 "Q. When you say you signed this consistent with the idea
2 there would be no cash, this says cash. This says cash will be
3 transferred to Barclays.

4 "A. Yeah, but cash would be transferred against liabilities.

5 "Q. So to the extent that cash was simply needed to cover the
6 liabilities, you thought it was possible to be included in the
7 deal, is that correct?

8 "A. Yes."

9 This is the trustee's 30(b)(6) representative whose
10 testimony they are bound by, and even he is recognizing that to
11 the extent that the margin, even cash, was necessary in order
12 to satisfy, secure liabilities that existed at that time, that
13 we're entitled to it.

14 THE COURT: Okay.

15 MR. BOIES: Thank you.

16 THE COURT: Thank you.

17 Mr. Maguire?

18 MR. MAGUIRE: We have two issues to address, Your
19 Honor. In terms of which one you'd like me to address first,
20 is there any preference?

21 THE COURT: Take your pick.

22 MR. MAGUIRE: Okay. Well, starting with the last one,
23 the issue of the offset, Mr. Boies started out by saying that
24 the liabilities that that -- Barclays' not getting the margin
25 meant they weren't getting the pro for the quid. And that,

1 frankly, is what we tried for thirty-four days, which was was
2 the margin consideration for taking on the exchange-traded
3 derivatives business. Was the margin in the deal or was it not
4 in the deal. Here, Barclays was acquiring the North American
5 business of Lehman Brothers. It was acquiring an extremely
6 valuable franchise. It wasn't just acquiring derivatives; it
7 was acquiring the entire franchise. It could have done that
8 with the margin if that was the deal. It could have done that
9 without the margin if that was the deal. And the whole issue
10 that we tried for thirty-four days, was -- which is was the
11 margin in the deal or wasn't it in the deal. And that issue
12 was squarely resolved by the Court's opinion in February, which
13 was the margin was excluded from the deal. And the Court
14 squarely rejected the arguments that Barclays made that no
15 rational purchaser would undertake a deal of this kind without
16 having the margin in hand for the reason that the issue was not
17 what a rational purchaser would or would not do but what, in
18 fact, the parties had agreed to do in this specific
19 circumstance.

20 Mr. Boies did not respond to the points that I raised
21 earlier, which is that his new offset argument is a 180-degree
22 reversal of the affirmative representations that Barclays made
23 to the Court before and after the trial in which on occasion
24 and reoccasion, Barclays reaffirmed that it took, under the
25 clarification letter, under the asset purchase agreement, not

1 under the transfer and assumption agreement, under the
2 clarification letter, it took responsibility for the short
3 exchange-traded derivatives positions.

4 Mr. Boies refers, instead, to the testimony of the
5 trustee's counsel Mr. Kobak, but as you will recall, Your
6 Honor, Mr. Kobak was present here at the sale hearing. What he
7 heard was that there was no Lehman cash going to Barclays. All
8 of his testimony is based on his understanding at the time
9 which was that there was no proprietary, no Lehman-owned cash
10 that was going to Barclays. Obviously, there was customer
11 property that was going to Barclays, not the firm's property.

12 That's really all I have to say, I think, on the
13 offset issue, Your Honor. Unless you have a question, I'm
14 happy to turn to the other issue concerning government
15 securities.

16 THE COURT: So your position on the offset issue is
17 that you're entitled to approximately 2.1 billion dollars in
18 cash, cash equivalents, and government securities without
19 offset.

20 MR. MAGUIRE: With no offset of any kind.

21 THE COURT: Yes.

22 MR. MAGUIRE: That's correct, Your Honor.

23 THE COURT: Okay, I understand it.

24 MR. MAGUIRE: And now on the subject of government
25 securities, Barclays is raising this accounting convention that

1 the parties used in their annual reports whereby for purposes
2 of financial statement presentation, government bonds were
3 classified in different categories, depending on their
4 maturities, obviously, something that we did not at all explore
5 in the course of this trial. This trial was not a fight over
6 the duration of government securities or long bonds. This
7 trial was a fight about margin, and it was very clearly about
8 all of the margin. We were not disputing some of the margin;
9 we were disputing all of the margin. And we put on the board
10 and we fought through the thirty-four day hearing the number of
11 four billion dollars.

12 THE COURT: You make it sound as if the whole trial
13 was about margin; of course, it was about a lot of other
14 things, as well.

15 MR. MAGUIRE: There were a few mundane matters that
16 managed to sneak in, but from my narrow perspective, Your
17 Honor, you'll understand that --

18 THE COURT: I understand what you were fighting about.

19 MR. MAGUIRE: And that four billion dollar number that
20 I believe is reflected in the Court's opinion, of course,
21 includes the one and a half billion of government securities.
22 We did not come into this Court asking for two and a half
23 billion dollars in margin, and Barclays did not defend against
24 two and a half billion dollars of margin. We fought the fight
25 over the four billion, and the four billion includes every

1 dollar of those long-term government bonds, whether the
2 maturity is ninety days or ninety years. They're all in the
3 four billion that we fought about before you.

4 Mr. Boies suggested that Your Honor's opinion does not
5 lay out a basis to award the margin or to find that those long-
6 term government bonds belong to the estate and to the trustee,
7 and I respectfully disagree with Mr. Boies on that score.
8 There are multiple bases in the Court's opinion. Very
9 specifically, the Court pointed to exclusion N in the Court's
10 opinion -- in the agreement, the parties' agreement, the asset
11 purchase agreement. And Barclays entirely ignored that when
12 they filed their main brief, here, and they obviously saw our
13 brief, and they did respond on reply. And our slide 4 sets
14 forth where Barclays acknowledged on reply in their brief at
15 paragraph 74 the fact that this had been raised and had been
16 addressed. In the first sentence of that paragraph, Barclays
17 states, "The trustee also points to footnote 35 of the Court's
18 opinion in which the Court appears to have adopted the
19 trustee's argument that subsection N of the definition of
20 excluded assets included any assets primarily related to
21 exchange-traded derivatives." It goes on, then, where Barclays
22 respectfully reiterates its assertion.

23 Now, that, frankly, sounds to us an awful lot like
24 reconsideration and reargument. And in the course of the
25 proceeding that we're here today in terms of the form of the

1 order that should be entered giving effect, it seems that that
2 is not properly posed. And even if this were properly a motion
3 for reconsideration or for reargument, we respectfully submit
4 that there is absolutely no basis for any such motion because
5 there is no controlling factor, controlling law that Barclays
6 points to that was overlooked by the Court. On the contrary,
7 exclusion N which excludes all assets primarily related to
8 derivative positions, no matter what their maturity is, that
9 was squarely addressed at the trial and that is squarely
10 addressed in the Court's opinion, as, of course, is exclusion B
11 for cash, cash equivalents, and our quibble over what is a cash
12 equivalent I don't believe matters here when you consider all
13 the other items and exclusions that we have. But I would point
14 out that in addition to excluding cash and cash equivalents,
15 the sentence goes on to cover similar cash items.

16 So we have exclusion N clearly covers all assets, all
17 the margin assets. We have exclusion B that covers cash, cash
18 equivalents, and similar cash items. And then of course,
19 that's without even getting to the specific exclusion for
20 government securities which is not only before the Court, in
21 the parties' agreement, and specifically addressed in the
22 Court's opinion.

23 So respectfully, we disagree with Mr. Boies and
24 believe the Court's opinion does, indeed, lay out a basis for
25 the trustee to be entitled and to recover the one and a half

1 billion dollars of long-dated government bonds.

2 Mr. Boies suggested that there's an exception to the
3 exclusion for government securities in 1(b) because it says
4 "except to the extent otherwise provided". But he stopped
5 there and he didn't say where it might otherwise be provided.
6 But I have a suspicion that he might be thinking about Mr.
7 Rosen's famous parenthetical, which, of course, has been
8 litigated, was the subject of the trial, is clearly the subject
9 of the Court's opinion, which the Court interpreted that to
10 mean customer property and could not possibly be a basis for
11 Barclays to carve out any Lehman proprietary government
12 securities.

13 That's all I have, Your Honor, unless you have any
14 questions.

15 THE COURT: Anything more, Mr. Boies, on this point?

16 MR. BOIES: No, Your Honor, not on those points. I
17 have one more point that's -- it's a much smaller point. I
18 have one more point.

19 THE COURT: Does it relate to the subject of margin?

20 MR. BOIES: Yes.

21 THE COURT: Okay, I'd like to hear it then.

22 MR. BOIES: And this has to do with what are called
23 clearing funds, and this is an issue that does relate to
24 millions and not billions, but it relates to a substantial
25 number of millions, 171 million dollars, at least.

1 First -- and these are tabs 13 through 18 -- clearing
2 funds are deposits that clearing corporations require their
3 clearing members to deposit to secure the obligations of the
4 clearing members. Now, these are -- this is not margin in the
5 sense that we've been talking about up until now. And if you
6 look at tab 14, the clearing funds are a long-term requirement.
7 They do not fluctuate on a daily basis in the way that margin
8 requirements do.

9 Second, they are used to secure obligations relating
10 to both customer and proprietary trading without distinguishing
11 between the two so that when they put clearing funds, it's not
12 limited to proprietary, it's not limited to customer. It
13 permits both to go forward.

14 Third, the clearing funds from LBI were pooled with
15 those from other clearing brokers, and the clearing corporation
16 had the ability to draw from that pool when any clearing member
17 defaulted. That is, this is money that is put up by LBI, it's
18 given to a clearing corporation like OCC -- let me take OCC as
19 the example because LBI had 171 million dollars of deposited
20 clearing funds at OCC. Those clearing funds were available for
21 OCC to use for customer accounts, proprietary accounts, or for
22 defaults from companies other than LBI.

23 Now, the Court did not mention clearing funds in its
24 opinion, but in the margin numbers that we're talking about,
25 these clearing funds are included. That is, the margin that

1 they are seeking to recover includes these clearing funds. And
2 if you go to chart 17, what the Court held at page 89 of the
3 Court's opinion was that "various regulations and rules require
4 customers to deposit collateral with a broker-dealer, or in the
5 case of futures, their futures commission merchant to support
6 trading of futures and options contracts. This collateral
7 which is deposited by customers with a broker-dealer or future
8 commission merchant and held for the benefit of customers
9 constitutes the property that may be held to secure obligations
10 under exchange-traded derivatives."

11 Now, these funds that are deposited are deposited to
12 help secure the obligations under the exchange derivative
13 contracts of both proprietary and customer. And because of
14 that nature, we think that those do not fall within the margin
15 the way the Court was defining it in the Court's opinion.

16 The only thing, it occurs to me that I should be clear
17 about -- with the Court, I think I said this before, but I want
18 to be sure I did. The idea that -- the argument that we're
19 making with respect to margin, either with respect to cash and
20 cash equivalents or with respect to the -- what constitutes
21 margin or what our obligations were in the absence of the TAA
22 is not a new argument. This was in our post-findings of fact,
23 conclusions of law that we submitted to Court before -- long
24 before these briefings issues. I think I made that clear, but
25 I want to -- I didn't want the Court to be under any

1 misapprehension because counsel sort of implied that again in
2 what he just said. Where we have said that we have been
3 entitled to all of the margin and all of the liabilities and
4 all of the short positions related to where we were saying that
5 was our position. And that has been our position from the
6 beginning.

7 Our position now is no different. We think we are
8 entitled to that, but the Court held otherwise. So what we're
9 saying is that with respect to that Court holding, if you're
10 going to hold otherwise and you're going to hold that we're not
11 entitled to the margin, then we ought to at least be able to
12 keep the margin that offsets the liabilities that existed at
13 the OCC which we didn't have to take. We didn't have to sign
14 that TAA. We could have just let the OCC close out their
15 accounts, which is what the OCC was going to do.

16 THE COURT: Mr. Boies, this last point you're making
17 hearkens back to an earlier point you made. I take it it's
18 different from the clearing funds argument --

19 MR. BOIES: Yes.

20 THE COURT: -- that you had just made?

21 MR. BOIES: Yes, Your Honor, you're right, Your Honor.
22 And I just -- it was different. And it just occurred to me
23 that I wanted to be really sure that I'd been clear with the
24 Court about that point. I think I mentioned that point before,
25 but I wanted to be really clear that the distinction between

1 saying we're entitled to all of the margin, all of the long and
2 all of the shorts, which was our original position continues to
3 be our position. And what we're doing now, is accepting that
4 the Court's ruled against us on that, and saying, if we're not
5 entitled to all of this, we should be at least entitled to the
6 margin that is required to offset at least the OCC
7 liabilities -- forget everything else -- at least the OCC
8 liabilities that we signed an agreement that was designed, as
9 everybody knew and said at the time and told Your Honor at
10 trial, was designed to prevent and was necessary to prevent the
11 OCC from simply closing out all those accounts.

12 THE COURT: Okay.

13 MR. BOIES: Thank you, Your Honor.

14 THE COURT: I think I should give Mr. Maguire an
15 opportunity to comment about this clearing funds argument,
16 which frankly is a new argument to me.

17 MR. MAGUIRE: Yes, it is new, Your Honor. We would
18 agree with that; it's new to us as well. We do agree with Mr.
19 Boies that it is -- this entire amount in the clearing funds is
20 included in the two billion of margin that we've been talking
21 about, and we do agree that these clearing funds were funds
22 that were kept to secure exchange-traded derivatives positions,
23 both firm-proprietary and customer. But all of this clearing
24 funds is Lehman proprietary government securities. It's all
25 Lehman property and it was all as the exchanges for the purpose

1 of securing as margin for the Lehman and the customer
2 securities. None of it is customer property.

3 THE COURT: So is it the trustee's position that there
4 is no appropriate distinction to be made with respect to the
5 term "clearing funds" and that clearing funds are properly
6 included in the general category of margin and that all of
7 these funds should be turned over to the trustee?

8 MR. MAGUIRE: That is exactly our position, Your
9 Honor. It falls squarely within the margin assets that are the
10 subject of exclusion and squarely within the cash, cash
11 equivalents, similar cash items of exclusion B and squarely
12 within the clarifications letter, exclusion of government
13 securities.

14 THE COURT: Okay. I think I've probably heard a
15 sufficient amount of argument on the substantive margin and I'm
16 inclined to take a ten-minute break before going into the next
17 phase of our arguments so that we can all stretch our legs and
18 refresh ourselves a little bit. So let's take a ten-minute
19 break, and I'll see you at twenty-five of the hour.

20 (Recess from 3:27 p.m. until 3:43 p.m.)

21 THE COURT: Let's move on to the next matter in
22 dispute.

23 MR. MAGUIRE: If it pleases the Court, Bill Maguire
24 for the trustee.

25 Your Honor, our next issue is the question of the

1 trustee's claim for pre-judgment interest on the amounts due to
2 the trustee under the Court's ruling. Now, we believe,
3 respectfully, that that's well within the Court's power to
4 award the trustee interest and to award the trustee interest at
5 the New York statutory rate of nine percent on the margin
6 assets. We believe that is well within the discretion of the
7 Court under Count II and Count III of our claims because they
8 are claims for declaratory relief that arise under state law.

9 We also have a claim for conversion. And the reason I
10 raise this is because we submit that for a claim of conversion
11 under New York State law, the awarding of interest at the
12 statutory rate is mandatory. Now, the conversion claim was one
13 of those claims in our adversary proceeding that was deferred
14 and was not one of the claims that was live in the course of
15 the thirty-four day trial. However, the Court's ruling in
16 February, we submit, deals with the issue of the rights to the
17 margin and, we believe, substantively disposes of the merits of
18 that claim. And we don't think it's necessary for us to do a
19 redo just for the purpose of establishing our right to
20 interest.

21 Barclays makes an argument that in conversion, the
22 right to pre-judgment interest at the New York rate only arises
23 when -- from the time that a demand has been made, so they seek
24 to cut off the interest, about a year's worth of the interest.
25 In fact, we disagree with Barclays' statement of the law

1 because the entire demand requirement is excused in certain
2 circumstances where the person in possession of the property
3 already knows that their possession is unlawful. The whole
4 purpose of the demand requirement is to put the innocent
5 possessor on notice that there's a problem with their
6 possession and then to give them a chance to cure it by giving
7 up possession.

8 Now, here, we respectfully submit Barclays was on
9 notice from the very beginning that it was not supposed to be
10 getting any of Lehman's cash. It heard that at the sale
11 hearing, it was part of the asset purchase agreement, that's
12 the whole issue that we've heard throughout these proceedings
13 is that affirmative representations were made to this Court at
14 the sale hearing in which Barclays participated, that there was
15 no Lehman cash going to Barclays. And on this specific issue,
16 there's no nuance, there's no room, really, for any question of
17 definition about the word "cash". Here, we're talking now, the
18 sums that Barclays is supposed to be paying us on our pre-
19 judgment interest is large part cash. At tab 5 of our binder,
20 we show you there, Your Honor, that the parties stipulated that
21 the cash we're talking about, the 1.3 billion dollars in cash
22 assets that Barclays got immediately on the closing of this
23 deal was all cash. It was not government securities. The
24 trustee has the government securities; what Barclays got was
25 the very cash that the Court was told Barclays was not supposed

1 to be getting. And you may recall, in the course of the trial,
2 there were a number of e-mail exchanges back and forth in which
3 Barclays' counsel corresponded directly with the Option
4 Clearing Corporation to determine and confirm that indeed, this
5 was cash.

6 THE COURT: Mr. Maguire, is your request for pre-
7 judgment interest at the nine percent rate limited to the 1.3
8 billion dollars in cash assets or is it a request that extends
9 to the approximately 2.1 billion dollars in margin?

10 MR. MAGUIRE: It's everything, Your Honor. 1.3 is
11 part of it because that's pure cash, and if you turn to the
12 next tab, Your Honor, you'll see that the second piece of our
13 claim that gets us to the balance of the 2-whatever billion
14 dollars is money market funds. This was money that --
15 proprietary Lehman money that it maintained in an account. It
16 was referred to sometimes as the buffer or the excess in the
17 account that was supporting customer derivatives trading. And
18 that was in the form of money market funds. And I don't
19 believe there's ever been any question from Barclays -- before,
20 during, after, even in the course of our mutual briefing these
21 issues before the Court, there's never been any suggestion that
22 money market funds are anything other than cash or cash
23 equivalents. So the some-several hundred million dollars in
24 money market funds which, when aggregated with the 1.3 billion,
25 comes to the totality of the 2-whatever billion dollars that is

1 the entirety of the margin assets that Barclays has that is due
2 to the trustee. And I think the only piece, maybe, that is not
3 pure cash in all of that would be the clearing funds. So to
4 the extent that Barclays has any of those in the form of
5 security, then I guess they would be government securities.

6 THE COURT: Is it -- just to say what I guess is
7 obvious from what you've said, as to the 2.1 -- more or less --
8 billion dollars that the parties stipulate represents the
9 calculation of margin to be turned over by Barclays to the
10 trustee, that entire amount, except, perhaps, for the clearing
11 funds that you just referenced, constitutes cash or cash
12 equivalents in an amount that the trustee would assert Barclays
13 knew it didn't have a right to hold from at least the date of
14 the sale hearing, as a result of which you assert that you
15 should be entitled to nine percent pre-judgment interest
16 running from September 22, 2008, is that correct?

17 MR. MAGUIRE: That is exactly correct, and the only
18 thing that I'm slightly uncertain about, Your Honor, is exactly
19 where the clearing funds fit into the picture. I just,
20 offhand, don't remember exactly if that's in the possession of
21 Barclays and part of the two billion are not. I believe it is,
22 but I need to confirm that for you.

23 THE COURT: Okay. Now, I understand the amount, I
24 understand the reason for the reference date for calculation.
25 What's the reason for the rate to be calculated at nine

1 percent, as opposed to the federal judgment rate?

2 MR. MAGUIRE: The reason, Your Honor, is simply that
3 New York law requires that, that this is something that arises
4 out of a state claim and under New York law applying our
5 conversion claim.

6 THE COURT: Even though the 90(b) (sic) trial did not
7 definitionally directly relate to that claim --

8 MR. MAGUIRE: That's --

9 THE COURT: -- it indirectly related to that claim.

10 MR. MAGUIRE: That's absolutely right. We deferred --
11 we agreed to defer for later cleanup the conversion claim on
12 the understanding -- educated understanding at the time that it
13 likely would be resolved, in substance, by the Court's ruling.
14 And in fact, we submit that it has been resolved, that there's
15 really nothing left to fight about on a conversion claim, given
16 the Court's ruling on the margin assets, so the only thing
17 that's left is the question of pre-judgment interest. But
18 where a party comes into court on a state claim of conversion
19 and prevails, then the party is entitled, as a mandatory
20 matter, to the nine percent.

21 THE COURT: Okay. Mr. Boies?

22 MR. BOIES: Thank you, Your Honor. Our tabs 34
23 through 39 address this issue. I mean, essentially, the
24 background is that two days before the April 28th briefs were
25 filed, the trustee informed Barclays for the very first time

1 that the trustee was claiming pre-judgment interest at a rate
2 of nine percent on any margin assets Barclays was ordered to
3 return.

4 The trustee agrees that this relates to a state law
5 issue. We think that even under New York State law they would
6 not be entitled to pre-judgment interest, but we think
7 certainly under federal law in the bankruptcy court they're not
8 entitled to this interest and they're not entitled to interest
9 at nine percent if they're entitled to any interest at all.
10 They say that they have a conversion claim and they agree that
11 the conversion claim was not litigated, but they assert that
12 that was just a formality because the underlying issues for the
13 conversion claim were litigated.

14 That simply is not so, Your Honor. I remind the Court
15 that this amount of money was transferred by them to Barclays.
16 Barclays didn't go take it. Barclays didn't embezzle it.
17 Barclays didn't steal it. Barclays did not get it in any
18 improper way. None of the requirements for a conversion under
19 state law are made out. The Lehman personnel responsible for
20 this paid it over. And the reason that they paid it over, Your
21 Honor, was because they had signed documents that said they
22 owed us the cash. They had sent e-mails saying they owed us
23 the cash. The OCC had sent them e-mails saying if you don't
24 say anything we're going to assume that this cash belongs to
25 Barclays and we're going to send it to them. And they sent

1 back e-mails that said okay.

2 This was a situation in which everybody worked on the
3 assumption -- and I'm not rearguing the merits because I know
4 what the Court has held, I'm simply saying that if you're
5 talking about state of mind and whether Barclays took this
6 improperly you've got to keep in mind that at the time it was
7 done everybody thought that Barclays was entitled to this.
8 That's what Weil Gotshal thought. That's what Lehman thought.
9 That's what LBHI thought. All of these people knew what was
10 going on. All of these people authorized it. So for them to
11 come in and say that somehow Barclays converted illegally these
12 funds because the Court has held that there was not a meeting
13 of the minds on the clarification letter and all of the
14 alternative grounds that the Court has, the fact is that
15 whether or not we are as a matter of contract entitled to it or
16 not, I don't think you can argue that there is any basis for
17 finding that Barclays somehow converted these funds.

18 Mr. Kobak, the 30(b)(6) witness, testifies that it was
19 his understanding at the time that we got the funds for the OCC
20 that were necessary to balance the liabilities -- the net
21 liabilities that we were taking on and it was not just the
22 thought that it was just cash. He didn't limit it to cash. He
23 didn't limit it to noncash. He didn't limit it to customer
24 accounts. He didn't limit it to proprietary accounts. The
25 Court's seen that testimony. That was the trustee's testimony

1 at the time.

2 Now, it may be that they were all wrong, and that
3 issue goes to the issues that we argued about before at the
4 trial and that to some extent we argued about in the earlier
5 phase of this hearing. But when you come to pre-judgment
6 interest I don't think there can be any argument that this was
7 all something that people voluntarily transferred at the time
8 because that was their interpretation at the time, right or
9 wrong, but that was their interpretation at the time as to what
10 was required.

11 Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. MAGUIRE: Your Honor, first as to the point that
14 we did not fully and clearly set forth that we were seeking
15 interest, I would just point out that our adversary complaint
16 count XII is a claim for conversion and it states -- provides
17 in paragraph 147, "The trustee is entitled to judgment in an
18 amount not less than 2.9 billion dollars together with
19 interest, cost and such other and different relief as the Court
20 may find just and proper." So I do believe the claim for
21 interest was set forth. I don't believe it's necessary that a
22 claim for interest be set forth, but that's neither here nor
23 there; it was set forth.

24 And also, the parties, in deferring that claim,
25 entered into a stipulation and order before the Court that was

1 dated January 13 of 2010. And in paragraph 4 of that
2 stipulation and order it is provided that "the stay of claims
3 referenced in paragraph 3 above" -- that includes the
4 conversion claim -- "is without prejudice to any party's
5 ability to seek resolution of those claims through motions
6 informed by or based on the Court's prior resolution of the
7 Rule 60(b) motions." So I believe the claim for interest was
8 made, it was preserved and is entirely proper.

9 I think I am in a position to clear up a little bit of
10 the question of the clearing funds composition here. My
11 understanding is that with the exception of nineteen million
12 dollars we actually have all of the clearing funds. So there's
13 no pre-judgment interest claim with respect to the clearing
14 funds.

15 THE COURT: Okay. You haven't responded yet to Mr.
16 Boies' contention that you really never put on a case for, nor
17 could you have put on a case for conversion under New York law
18 because the funds were simply turned over to Barclays at the
19 closing.

20 MR. MAGUIRE: Yeah, Barclays took over the accounts in
21 which the cash existed; there's no question about that. This
22 was not a case of somebody coming in and stealing the cash off
23 a suitcase and running out the door. This was done through a
24 commercial transaction in which the OCC accounts were
25 transferred.

1 At the time, of course, the trustee and the trustee's
2 counsel, as you've heard, had been informed at the sale hearing
3 that there was no Lehman proprietary cash. There was no cash.
4 And there was no cash specifically going to Barclays. Barclays
5 knew better. Barclays' counsel was the person who was directly
6 communicating with the OCC over the Friday and the weekend and
7 who specifically clarified that indeed there was cash.
8 Everybody was wrong; there actually was cash, and specifically
9 that it was proprietary cash.

10 And of course, Barclays got that cash. And Barclays
11 got that cash having fully participated in the sale hearing in
12 which the representations were made to the Court that Barclays
13 was not getting any cash. So in those circumstances to say
14 that the innocent party should have to find out exactly what is
15 happening and is not entitled to rely on the representations
16 that were made at the sale hearing but must undertake an
17 investigation and go ask the OCC for statements that are now
18 going to Barclays, as the account holder, to figure out that my
19 goodness, there actually is cash here and then send a demand to
20 Barclays saying we want the cash back, we think that's exactly
21 the kind of circumstance where demand is excused because the
22 party who is exercising unlawful possession is the party with
23 superior knowledge. It's the one party who has a derivative
24 expert, a lawyer on the scene at the time who is directly
25 communicating with the transferring party, the OCC, and who

1 knows right from the beginning, long before any demand has been
2 made, long before the trustee is in a position to even consider
3 making a demand, that there's billions of dollars of cash being
4 moved despite the representations that were made to the Court.

5 THE COURT: Okay. Okay, meaning I've heard the
6 argument.

7 Do you have anything more on this, Mr. Boies?

8 MR. BOIES: No, Your Honor, I don't think so. I think
9 the Court has in mind the record evidence on this. I think
10 that what counsel says just doesn't reflect the many, many
11 things that are in the record, testimony and documents in which
12 people knew what was happening, knew cash was being
13 transferred. Mr. Kobak's testimony, after the closing the
14 trustee transferred additional cash. So I just don't think it
15 reflects what's in the record.

16 THE COURT: Okay. I've heard enough on this and I'm
17 going to give it some thought. My immediate reaction, though,
18 is that I don't feel as if I presided over a trial for
19 conversion. I feel as if I presided over a trial that related
20 to the asset purchase agreement, the clarification agreement
21 and other ancillary agreements. And that's, in part, because
22 the very count that we're talking about, the conversion count,
23 was reserved for the future. But let me give it some thought.
24 I'm going to reserve on this one.

25 What's the next point that we need to discuss?

1 MR. MAGUIRE: If it please the Court, Bill Maguire for
2 the SIPA Trustee.

3 One additional point that we raised, Your Honor, is
4 that we believe on page 9 of the Court's opinion there is a
5 statement, we respectfully submit, and a statement that is
6 inadvertently inconsistent with the thrust of the Court's
7 opinion, and that is a statement, unimportant in and of itself,
8 that ascribes to the Friday asset scramble all three of the
9 disputed assets, including specifically the margin.

10 THE COURT: Let me stop you on this because I have
11 paid some special attention to this point that is in dispute
12 between the parties and I've actually reviewed some of the
13 underlying materials as well as my own thinking as I was
14 drafting the opinion. And it wasn't inadvertent.

15 We believed -- and that's my clerks and myself -- as
16 we were addressing the issues that were before the Court, that
17 regardless of whatever was in a stipulated fact, that the
18 evidence is consistent with there being attention paid on
19 Friday, September 19 to the three classes of disputed assets,
20 including margin. It doesn't matter whether there was or was
21 not any understanding reached on Friday morning to include
22 margin. Without question, I think, Paolo Tonucci's testimony
23 is consistent with some attention having been paid to that
24 category of asset.

25 For that reason I viewed it as part of the asset

1 scramble. It may not have resulted in an agreement to include
2 it, but it was clearly an asset that the parties paid attention
3 to after the APA had been drafted, and it became part of the
4 subject matter of the clarification letter. I think there's no
5 dispute as to that. So I don't consider the reference
6 inadvertent.

7 MR. MAGUIRE: Well, I would accept all of that, Your
8 Honor. The only reason we had any concern about this is
9 because we raised it with Barclays and we were concerned that
10 there not be an issue for any reviewing court where a reviewing
11 court was being told that there was a factual finding not as to
12 this being a matter that was looked at in the asset scramble or
13 as to which attention was being paid but that there was
14 actually an agreement, that there was actually an understanding
15 and that margin was indeed added on the Friday. And in that
16 case, if that kind of argument were to be made before a
17 reviewing court, if that characterization got lost or put on
18 the Court's statement then we had the concern -- certainly I
19 had the concern that a reviewing court might be put in a
20 position of saying here's a factual finding that is at odds
21 with the Court's ruling that the margin assets were excluded.
22 But as Your Honor has described it we have no issue with the
23 Court's statement --

24 THE COURT: --

25 MR. MAGUIRE: -- on page 9 of its opinion.

1 One remaining issue, I believe, Your Honor, concerns
2 the form of order on Rule 15c3-3. And I don't believe, despite
3 what you may have heard the last time, there really is any
4 substantive dispute between the parties on this.

5 We did litigate and fought hard about the issue of
6 whether Barclays had an unconditional right to the 769 million.
7 That is resolved by the Court's ruling.

8 We did not litigate whether Barclays has a conditional
9 right to the 769 million once the trustee is in a position to
10 pay all customers their property. We have never disputed that.
11 We have always agreed that we will pay Barclays the 769 million
12 when and to the extent we are able to, after taking account
13 what we need for customer property. So there's no dispute
14 there.

15 The reason why this is still a live issue is two
16 things in Barclays' form of order. One, Barclays wants us to
17 regularly do a 15c3-3 computation every week. That of course
18 is a completely pointless exercise and Barclays has no
19 contractual or other right to make us do that kind of thing.
20 We do report regularly to the Court, and if we're in a position
21 to be able to restore customers their property then it is very
22 likely we will be before Your Honor in connection with that.
23 So Barclays has whatever information it needs to apprise itself
24 of the ongoing status of the estate without any need for such
25 reporting which it has no right to and which is entirely

1 wasteful and unnecessary.

2 And secondly, we don't believe it's appropriate for
3 the trustee to be ordered to do something which the trustee has
4 agreed to do. We're perfectly happy to confirm again in
5 writing to Barclays that we're willing to do that. We already
6 have. It's clear from Your Honor's order that we have to do
7 it. So there's no dispute.

8 We're happy to put it in the order in a whereas clause
9 so that it's absolutely clear for all to see that that's what's
10 going to happen. The only objection is to putting it in a
11 decretal paragraph in which there is something that we have to
12 do in the future.

13 And the concern -- the reason I raise that concern is
14 simply I do not want to have to address any issue by any
15 reviewing court as to whether there is subject matter
16 jurisdiction, depending on whether this is a ministerial act or
17 is not a ministerial act and whether putting this in the
18 decretal section of the Court's final order destroys finality.
19 It seems to me Barclays is fully protected. There is no -- we
20 have not said -- we are not in breach and we have not said we
21 will breach. There is no anticipatory breach. On the
22 contrary, we have said we will fully honor that commitment.
23 And as I say, we're happy to reaffirm it in a written
24 agreement. We're happy to stipulate. We're happy to have it
25 go in a whereas clause. We just don't think this should be

1 anything that's in a decretal section of the Court's order and
2 not something that the parties should have to deal with in
3 terms of raising a finality issue that's entirely unnecessary.

4 THE COURT: Mr. Boies, do you have any reaction to
5 that?

6 MR. BOIES: Your Honor, I mean, we argued we're
7 entitled to the 769. They argued we weren't entitled to the
8 769. What the Court held is that we were conditionally
9 entitled to the 769, that we were entitled as much of the 769
10 as could be paid when and if the trustee determined that there
11 were sufficient assets to repay all LBI customers. All that
12 we're asking is that that be put into the order. That doesn't
13 destroy any subject matter jurisdiction. That simply reflects
14 what the Court has found.

15 THE COURT: Well, you were looking, if I remember
16 correctly, for active reporting.

17 MR. BOIES: Yes, Your Honor, and --

18 THE COURT: Is that still part of your proposed order?

19 MR. BOIES: Your Honor, I'll withdraw the active
20 reporting. As long as the trustee will say, as he did to the
21 Court, that he's going to report on this periodically to the
22 Court, it doesn't have to be weekly. And if he gives us a copy
23 of it when he reports to the Court that's fine. We're not
24 interested in making him do additional work.

25 THE COURT: Does that work for you, Mr. Maguire?

1 MR. MAGUIRE: What I was referring to, Your Honor, are
2 our regular reports that we make on the state of the estate to
3 the Court as well as applications that we make from time to
4 time whenever we're in a position to bring something before you
5 concerning customer property. So that I would understand would
6 be entirely satisfactory.

7 MR. BOIES: Yes, I --

8 MR. MAGUIRE: Certainly we will continue to do that,
9 and within a nanosecond of us filing any such report I have no
10 doubt my colleagues will have it but we will make sure that
11 they have it.

12 MR. BOIES: Okay. And I accept that. I am confident
13 he will -- as he says, when they reach that point they'll tell
14 the Court and if they tell us that'll be fine.

15 THE COURT: All right. That seems like an agreement.

16 And to the extent that it's useful to note this, I
17 don't believe that including within the order -- anywhere
18 within the order the notion that the rights under 15c3-3 are
19 conditional and will be dependent upon future events not yet
20 foreseeable has any impact upon the finality of the
21 determination. I believe it is a final determination fully
22 consistent with that section of the opinion that dealt with
23 that subject matter.

24 MR. BOIES: And we agree with that, Your Honor.

25 THE COURT: In that case, the finality question should

1 be resolved for any review in court.

2 Now, is there more?

3 MR. BOIES: I don't think so, Your Honor, but can I
4 have just a moment to consult?

5 THE COURT: Sure.

6 MR. BOIES: Your Honor, we are in agreement.

7 THE COURT: Good. I think what I'm going to propose
8 is that I want to give some further thought to the two
9 principal subjects that have been argued this afternoon and
10 spend a little bit more time reviewing the demonstrative
11 materials that have been proposed. It seems to me that it
12 shouldn't take very long for me to resolve this and I have
13 fairly clear and I think transparent observations that I've
14 made as to how I see these things and some of the concerns I
15 have.

16 I particularly want to focus some attention on the
17 pre-judgment interest question, which I'll be candid to
18 observe, is one that before the hearing I was prepared to rule
19 on in connection with the settlement at 1.1 billion dollars of
20 the clearance box asset question. And it's one of the reasons
21 that I raised with counsel in the context of that presentation
22 early in the hearing the question of whether the use of nine
23 percent for purposes of deriving the 1.1 billion dollar number
24 might be construed as a balanced agreement in which nine
25 percent would be applicable on both sides. I quickly learned

1 that that was not true. But I think it's also true that if I
2 had been asked to rule on the question of the entitlement of
3 Barclays to obtain nine percent interest with respect to the
4 calculation of what was due and owing in connection with the
5 clearance box that I doubt that I would have found that nine
6 percent was a fair and appropriate interest rate. But that's
7 simply my now expressed subjective intent. I'm simply letting
8 you know that you made an appropriate agreement and I'm pleased
9 not to have to deal with it further.

10 But I want to give some further thought to what to do
11 with the rate as to the trustee's claim. My suggestion is that
12 we not set a date yet for a follow-up conference or hearing
13 until I have concluded my deliberations, which shouldn't take
14 terribly long, and we will advise counsel and attempt to
15 schedule an appropriate date for a follow-up. Does that work
16 for everybody?

17 MR. BOIES: Yes, Your Honor.

18 THE COURT: Okay. I'll see you next time then.

19 Oh, I forgot your letter.

20 MR. GAFFEY: My letter, Your Honor.

21 THE COURT: Your letter.

22 MR. GAFFEY: Hence I rise.

23 THE COURT: And you're standing up and your red tie
24 helped to remind me of the letter that you sent me a week or
25 two ago.

1 MR. GAFFEY: I knew the red tie was a good idea, Your
2 Honor.

3 THE COURT: It was a good idea.

4 MR. GAFFEY: Robert Gaffey for the debtor, Your Honor.
5 We wrote to the Court on the 29th of April asking that in
6 accordance with this Court's rules that this conference also be
7 treated as a pre-motion conference with respect to a summary
8 judgment motion that the debtor would like to make.

9 Your Honor will recall we had four claims extant as a
10 result of the stipulation that Mr. Maguire talked about a few
11 moments ago, and under paragraph 4 of that stipulation those
12 claims could be resolved as informed by the 60(b) proceedings.

13 With respect to three of them I have a stipulation
14 proposed to Barclays. That's with respect to the debtors'
15 claims for unjust enrichment conversion and aiding and abetting
16 breach of fiduciary duty where we would agree to have those
17 claims dismissed. We're not quite done; there's one language
18 issue which I think I just took care of before, but we ought to
19 shortly have a stipulation on that.

20 That leaves our claim for breach of contract, as it
21 relates solely to Barclays' obligation under the asset purchase
22 agreement with regard to the bonus aspect of the consideration
23 it was required to pay. Put quite briefly, and as we said in
24 our letter, I think there's a basis for us to move based on
25 factual findings that the Court made and discussed in the

1 February opinion. We think that they can be put forward as
2 undisputed or undisputable facts based on the doctrine of
3 collateral estoppel, and I think the motion would be soundly
4 based. We'd like to proceed with it on a schedule to be set or
5 agreed.

6 THE COURT: Okay. This is a pre-motion conference.
7 Is there any objection to giving LBHI the opportunity to file
8 its motion for a summary judgment?

9 MR. BOIES: Your Honor, I don't think so. I think
10 they've got a right to file it. We think that is not well
11 taken but the fact that we think it's not well taken I don't
12 think can deprive them of the right to file it.

13 THE COURT: Well, this is just the gate keeping
14 function that we occasionally get a chance to exercise as to
15 whether or not a motion is ripe for filing and briefing, and it
16 seems to me there's no dispute that it is ripe. It's clearly
17 going to be disputed, based upon Mr. Boies' general
18 observations, and we'll see what happens next.

19 MR. GAFFEY: And we can work out a briefing schedule
20 once we've gone ahead.

21 THE COURT: I think that's a good idea.

22 MR. GAFFEY: Thank you, Your Honor.

23 THE COURT: And my only suggestion is that before
24 everybody leave I'm going to adjourn the hearing and I'm going
25 to go off and talk to my courtroom deputy and see if I can

1 identify some possible dates for a follow-up just so you can
2 know what those dates are in advance. I'm not saying that
3 we're going to have a hearing but I'd like to maybe clear
4 everybody's calendar. I know that everybody's quite busy. So
5 one of my law clerks will come out and at least surface those
6 dates with you on an informal basis.

7 MR. BOIES: Thank you, Your Honor.

8 THE COURT: Okay. We're adjourned.

9 (Whereupon these proceedings were concluded at 4:20 PM)

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Dena Page

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